INTERIOR BOARD OF INDIAN APPEALS

Geraldine Johnson Executive Committee of the Elem Indian Colony of Pomo Indians v. Pacific Regional Director, Bureau of Indian Affairs

54 IBIA 60 (09/21/2011)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

GERALDINE JOHNSON EXECUTIVE COMMITTEE OF THE ELEM INDIAN COLONY OF POMO INDIANS, Appellant,	)	Order Dismissing Appeal
v.	)	Docket No. IBIA 11-132
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	September 21, 2011

The Geraldine Johnson Executive Committee (Appellant) of the Elem Indian Colony of Pomo Indians (Tribe) appealed to the Board of Indian Appeals (Board) from a May 20, 2011, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA).[1] Appellant challenges the Regional Director's determination in the Decision that a November 6, 2010, election of tribal officials was valid.[2] A BIA decision to review and decide the validity of a tribal election must be premised on a need for BIA to take

[1] Other than Geraldine Johnson, Appellant's notice of appeal does not identify any members of its Executive Committee, but the Decision identifies the members of this group as consisting of Johnson (Chairperson), Batsulwin Brown (Vice-Chairperson), and David Brown (Member-at-Large). The Tribe's Executive Committee apparently split into two factions in late 2009 and early 2010, with both factions — the Johnson Committee and the "Garcia Committee" — then claiming to be the rightful leadership of the Tribe. Sara Garcia is the Secretary/Treasurer of the Tribe, who held that position prior to the split and who apparently was re-elected to that position in the November 2010 election recognized in the Decision.

[2] In the November 6 election, an Executive Committee was elected consisting of Nathan Brown, II (Chairman), Richard Steward (Vice-Chairman), Sara Garcia (Secretary/ Treasurer), Karen Smith (Member-at-Large), and Leora John (Member-at-Large) ("Brown/Steward Executive Committee").

some Federal action.[3] In this case, the Federal action required of BIA was BIA's review and action on a proposed attorney contract. Under BIA's regulations, an action by an authorized BIA official to approve a tribal attorney contract is final for the Department of the Interior (Department) and is not subject to appeal to the Board. We dismiss this appeal because we lack jurisdiction over BIA's tribal attorney contract approval action, and BIA's decision to recognize the results of the November 6 election was part and parcel of that action.

Background

The Tribe's Constitution requires BIA approval of fee-charging attorney contracts. At a General Council meeting held on October 2, 2010, several resolutions were adopted by the General Council, including one to retain Anthony Cohen, Esq., of Clement, Fitzpatrick & Kenworthy, as the Tribe's attorney.[4] Other resolutions authorized actions related to and calling a tribal election for tribal governing officials on November 6, 2010. Following the election, the Brown/Steward Executive Committee presented the attorney contract and the results of the November 6 election to BIA's Central California Agency Superintendent (Superintendent).

In a response dated November 12, 2010, the Superintendent acknowledged receipt of the notification of the November 6 election and addressed the request for BIA to approve the attorney contract. Letter from Superintendent to Nathan Brown, II, Nov. 12, 2010 (Superintendent's Decision). The Superintendent found that the request for approval of the attorney contract triggered a need for federal action. He stated that because BIA "is required to review and approve the proposed attorney contract . . . [BIA] must first determine whether the November 6, 2010, tribal election was conducted in accordance with tribal law, and that [BIA] is working with duly elected tribal officials." *Id*. at 1. After concluding that the November 6 tribal election was valid, the Superintendent noted that after technical review, he would transmit the attorney contract to the Regional Director with his recommendation for

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[3] *See Del Rosa v. Acting Pacific Regional Director*, 51 IBIA 317, 320 n.6 (2010); *George v. Eastern Regional Director*, 49 IBIA 164, 186-87 (2009); *Wasson v. Western Regional Director*, 42 IBIA 141, 153-54 (2006).

[4] Appellant disputes the validity of the October 2, 2010, General Council meeting and the actions taken at and pursuant to resolutions adopted at that meeting, including the calling of the November 6 election. Appellant does not challenge the actual conduct of the November 6 election or raise other issues related to the election that are independent of the October 2 meeting.

consideration of approval. Although the Superintendent purported only to make a recommendation to the Regional Director, he provided appeal rights in his decision.

The Regional Director's review of the attorney contract occurred in two steps. First, she approved the attorney contract itself on November 18, 2010, finding that it "was adopted by the [Tribe's] General Council on October 2, 2010." *See* Emergency Motion of Elem Indian Colony, June 30, 2011, Ex. A.[5] Second, in response to Appellant's appeal from the Superintendent's decision, the Regional Director issued her Decision. In the Decision, the Regional Director concluded that the Superintendent properly had decided that Federal action was required "to identify who had authority to speak for the Tribe with respect to requests for federal actions such as approval of an attorney contract," and to decide "which Committee actions he could recognize in order to identify individuals who could represent the Tribe on a government-to-government basis." Decision at 13. The Regional Director affirmed the Superintendent's decision to recognize the results of the November 6 election, and Appellant appealed the Decision to the Board.

The Board ordered briefing from the parties on whether the Board has subject matter jurisdiction over this appeal or whether the Regional Director's Decision, as an action approving a tribal attorney contract, is final for the Department, thus requiring dismissal of the appeal by the Board. *See* Notice of Docketing and Order for Supplemental Briefing on Motion and on Board's Jurisdiction, Aug. 19, 2011 (Order for Supplemental Briefing), at 2-5 (citing *Welch v. Minneapolis Area Director*, 17 IBIA 56 (1989) (BIA Area Director's decision approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and not subject to appeal within the Department)); 25 C.F.R. § 88.1(c) (same).[6]

In response, the Regional Director and the Brown/Steward Executive Committee argue that the Board lacks subject matter jurisdiction because the Tribe's request for approval of the attorney contract provided the only context for the Regional Director's Decision, and the only Federal *action* taken by the Regional Director was her approval of the contract.

Appellant does not dispute that the only request for Federal action that was pending before BIA, and which BIA identified as prompting its review of the November 6 election,

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[5] Shortly after this appeal was filed, the Brown/Steward Executive Committee filed an Emergency Motion for the Board to place the Decision into immediate effect.

[6] Section 88.1(c) of 25 C.F.R. is an example of an exception to the Board's general jurisdiction to review actions by BIA regional directors that are taken under regulations in 25 C.F.R. Part 2. *See* 43 C.F.R. § 4.330.

was the request for review and approval of the attorney contract. But Appellant contends that the Board has jurisdiction over this appeal because the Decision did not "merely" involve the attorney contract, apparently suggesting that the Decision is severable and that the Board has jurisdiction to review BIA's recognition of tribal officials, even if it cannot review the attorney contract approval action. Appellant's Response to Request for Supplemental Pleadings at 1. Appellant argues (1) that the Indian Reorganization Act (IRA) and BIA's trust responsibilities provide a statutory basis for the assumption of jurisdiction to review the validity of the November 6, 2010, tribal election; (2) the Regional Director's Decision was not purely discretionary in nature; (3) Appellant has standing to appeal from the Decision; and (4) if the Decision is not appealable, then an earlier decision by the Superintendent, dated June 3, 2010, which responded to a drawdown request by Johnson for funds under an Indian Self-Determination and Education Assistance Act (ISDA) contract, and which recognized Appellant as the Tribe's Executive Committee, should be deemed the last cognizable Federal action taken and Appellant should be deemed the duly elected Tribal government.

Discussion

We are not convinced by Appellant's arguments. Appellant neither addresses nor disputes the proposition that the Board lacks jurisdiction, under 25 C.F.R. § 88.1(c), and *Welch v. Minneapolis Area Director*, 17 IBIA 56 (1989), to review BIA's decision to approve the Tribe's attorney contract. Nor does Appellant identify any additional Federal *action* effectuated by the Decision.

Instead, Appellant attempts to bifurcate the Federal action approving the attorney contract, on the one hand, and BIA's rationale and justification for taking that action, on the other hand. Focusing on BIA's rationale, Appellant devotes much of its response to arguing the merits of the Decision, specifically contesting the Regional Director's determinations concerning the validity of the October 2, 2010, General Council meeting, and the November 6, 2010, tribal election that was called by a resolution adopted at the October 2 meeting. Appellant contends that because BIA's recognition of the results of the November 6 election may have implications beyond the attorney contract approval, the Decision did not "merely involve the approval of the attorney contract," and therefore the Board has jurisdiction over an appeal from that Decision. Appellant's Response to Request for Supplemental Pleadings at 1. But the fact remains that the only Federal *action* that prompted BIA's review of the October 2 meeting and the November 6 election was BIA's review of and decision to approve the attorney contract. The sources of Appellant's complaint are the Regional Director's underlying determinations, but none of Appellant's arguments, which we discuss below, refute the Board's observation that "the underlying determination to accept both the October 2 General Council meeting and the November 6 election as valid Tribal events appears to be part and parcel of BIA's approval of the attorney contract, and not a

separate 'action' or decision that is appealable to the Board." Order for Supplemental Briefing at 4.[7]

Appellant first contends that the IRA provides a basis for BIA and the Board to assert jurisdiction to review the tribal election, and that the Decision acknowledged BIA's obligation to review the Tribe's constitution and the election dispute under BIA's responsibility to administer the government-to-government relationship with the Tribe.[8] Appellant devotes considerable argument to why it believes that the Regional Director's Decision was erroneous, particularly her acceptance of the actions taken at the October 2, 2010, General Council meeting. But Appellant's arguments go to merits of the Decision, not to the character of the action taken or the subject matter of the Decision.[9] Appellant does not identify any Federal *action*, other than approval of the attorney contract, that served as the context for the Regional Director's review of tribal actions. In determining our subject matter jurisdiction to review the Decision, our inquiry is what Federal action was taken through the Decision, and not whether BIA might or should take other Federal actions, if so requested, that might otherwise be subject to review by the Board.

Appellant's second and third arguments — that the Decision was not purely discretionary in nature and that Appellant has standing — are irrelevant to the jurisdictional

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[7] Admittedly, both the Superintendent and the Regional Director generated confusion by providing appeal rights when both the Superintendent's recommendation and the Regional Director's Decision were premised on the need for BIA action on the attorney contract approval request. But the mere fact that appeal rights are included in a decision does not render the decision appealable to the Board if it has already become final by operation of law without a right for further administrative review.

[8] The IRA is codified at 25 U.S.C. § 461 et seq. Appellant does not identify or discuss any specific provision of the IRA.

[9] Appellant relies heavily on the Board's decision in *St. Pierre v. Comm'r of Indian Affairs*, 9 IBIA 203 (1982), in arguing that BIA and the Board have a free-standing duty and authority under the IRA to investigate tribal elections and to intervene in tribal disputes, independent of any requirement for Federal action (such as the attorney contract approval request), as necessary to address alleged violations of a tribal constitution that BIA approved pursuant to the IRA. Any such reading of *St. Pierre* was disapproved by the Board in *Burnette v. Deputy Assistant Secretary - Indian Affairs (Operations)*, 10 IBIA 464, 464 n.1 (1982). Moreover, the jurisdictional issue in *St. Pierre* did not involve a BIA decision to approve a tribal attorney contract.

question on which the Board ordered briefing. The extent and scope of the Board's jurisdiction to review discretionary decisions by BIA, *see* 43 C.F.R. § 4.330(b)(2), is not at issue in this case and was not a basis for the Board to request briefing on jurisdiction. Nor is Appellant's standing relevant to our disposition of this appeal. The issue is the Board's subject matter jurisdiction, not whether Appellant has standing.[10]

Appellant's final argument is that if the Board lacks subject matter jurisdiction to review the Decision, then a June 3, 2010, decision of the Superintendent "based on [Johnson's] request for ISDA funds should be deemed the last cognizable federal action." Appellant's Response to Request for Supplemental Pleadings at 10. However, Appellant fails to explain any basis for the Board to assert jurisdiction to "deem" the Superintendent's decision the last cognizable federal action. Appellant's appeal is from the Decision, and if we lack jurisdiction over an appeal from the Decision, that is the end of the matter in terms of the Board's authority to address merits-related issues in the underlying dispute.[11]

In summary, the only Federal *action* taken by BIA was the approval of the attorney contract, and that was that only action that provided the context in which BIA addressed the validity of certain tribal actions, including the tribal election. Whether the Regional

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[10] In its standing argument, Appellant relies on the Board's initial decision in *Welch v. Minneapolis Area Director*, *see* 16 IBIA 180 (1988) for the proposition that the Board is not prevented by 25 C.F.R. § 88.1(c) from hearing this appeal challenging a BIA decision concerning the validity of tribal actions. But the Board granted reconsideration, reversed the initial *Welch* decision, and dismissed the appeal, concluding that § 88.1(c) *did* preclude Board review. *See Welch*, 17 IBIA 56 (granting reconsideration of 16 IBIA 180 and dismissing appeal).

[11] To the extent that an ISDA request would necessitate Federal action, and the Regional Director's action on that request would provide subject matter jurisdiction for the Board, the Board raised that issue in its Order for Supplemental Briefing. In that order, we noted that a reference to ISDA in the Decision appeared to relate to a March 31, 2010, ISDA payment request from Johnson, which was separately decided by the BIA Awarding Official, and for which appeal rights were separately provided. Order for Supplemental Briefing at 4 n.5. We observed that Appellant's notice of appeal does not purport to be appealing from an ISDA decision. Appellant's response to the Order for Supplemental Briefing does not contend otherwise. In the Decision, the Regional Director specifically addressed the Superintendent's June 3, 2010, decision and concluded that issues concerning that decision were rendered moot by the subsequent tribal action upon which BIA's approval of the attorney contract was premised.

Director's determinations concerning those tribal actions were correct or incorrect, they were part and parcel of her decision to approve the attorney contract. Because the Regional Director's approval of the attorney contract was final for the Department, *see* 25 C.F.R. § 88.1(c), which Appellant does not dispute, we lack subject matter jurisdiction over the Decision. Any recourse that Appellant may have lies elsewhere than with the Board.[12]

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board concludes that the Decision was final for the Department, we dismiss the Brown/Steward Committee's motion as moot, and we dismiss this appeal for lack of jurisdiction.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

[12] In the Order for Supplemental Briefing, we also raised the question of whether, even if the Decision was intended to effectuate some additional Federal action independent of the attorney contract, the finality of the attorney contract approval decision would preclude us from considering what would be, in effect, a collateral attack on that final Departmental decision — e.g., by adjudicating underlying determinations that served the basis for the attorney contract approval. Because we dismiss this appeal for lack of subject matter jurisdiction, we need not address this additional issue.